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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

Misc. No. .....

KATHLEEN MAUDE MUCKENSTRUM, GLENDA DALE HODGES, JAMES MARSHAL REED and JEAN HERTZKA,
Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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To the United States Court of Appeals for the Fifth Circuit

Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on July 3, 1975.

OPINION BELOW

The opinion of the Court of Appeals is, as yet, unpublished, but is appended hereto as Exhibit A.

JURISDICTION

The judgment of the Court of Appeals was entered in July 3, 1975. On July 30, 1975 this Court entered an order extending the time to File a Petition for Writ of Certiorari to and including September 1, 1975. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. May the Government's failure to disclose substantial payments to a Government witness be deemed harmless where there is substantial evidence to support the conviction?

2. Is it error to instruct a jury that a "reasonable doubt" must be "substantial rather than speculative"?

STATEMENT

A. Conviction and Sentences

This is an appeal from the judgments, convictions and sentences of the United States District Court for the Southern District of Florida, wherein each of the defendants was convicted of one count of conspiracy to engage in interstate prostitution activities in violation of Title 18 United States Code § 1952 and one count of using interstate facilities or traveling in interstate commerce to promote prostitution activities in violation of Title 18 United States Code § 2421, and wherein appellant Reed was convicted of an additional count of inducing a woman to engage in interstate prostitution activities in violation of Title 18 United States Code § 2422.

Appellant Reed was sentenced to three years imprisonment and a fine of $1,500.00 on each of the three counts of which he was convicted; the prison terms to be served concurrently.

Appellant Hertzka was sentenced to two years imprisonment on each of the two counts of which she was convicted; such sentences to run concurrently.

Appellant Hodges was sentenced to two years imprisonment on each of the two counts of which she was convicted; such sentences to run concurrently; and she was further granted a split-sentence treatment under Title 18 United States Code § 3651 such that all but 30 days of her sentence was suspended.

Appellant Muckenstrum was granted a suspended imposition of sentence and two years probation on each of the two counts of which she was convicted.

The United States Court of Appeals for the Fifth Circuit affirmed the convictions.

B. Summary of Record

The indictment herein was couched in four counts: Count I charged all of the appellants with conspiracy; Count II charged appellant Reed with inducing Nevada Jean Robertson to engage in interstate prostitution activities; Count III charged appellants Reed and Hertzka with using interstate telephone communications to facilitate prostitution activities; and Count IV charged appellants Hodges and Muckenstrum with traveling in interstate commerce for purposes of prostitution.

The principal government witness, Nevada Jean Robertson, testified that she had met appellant Reed at a nightclub in Dyersburg, Tennessee, where he induced her to return with him to Miami, Florida, with the promise of employment (A. 65-66) and that shortly after their arrival in Miami, Reed advised her

that she would be going to Florence, South Carolina, and provided her with $125.00 for air fare. (A. 73-74).

Miss Robertson further testified that upon her arrival in Florence, she was met by Kathleen Muckenstrum and subsequently taken to Jean Hertzka's house. (A. 74-75). She stated that she first learned of the proposed prostitution activities while in Florence, and that she worked in Florence as a prostitute for about seven days, during which time she surrendered her receipts to Jean Hertzka and James Reed. (A. 78-82).

Another government witness, Earline Edwards, stated that she had worked at Jean Hertzka's place in 1970-1971, and had assumed custody of the money earned by the girls which she would eventually turn over to Jean Hertzka at the end of the day. Although Edwards testified that she had never been arrested for prostitution, it was stipulated that she had, in fact, been convicted three times for prostitution.

Additional government witnesses included Melanie Ann Gordon, who testified that she had worked and traveled to South Carolina as a prostitute in the employ of James Reed, together with appellants Hodges and Muckenstrum (A. 145-148); and Eve DeBlas, who stated that she had been Reed's housekeeper and was aware that Reed lived with both appellant Hodges and appellant Muckenstrum. (A. 183).

The defendants produced no evidence, but objected to various jury instructions given by the Court, particularly to that instruction regarding burden of proof and reasonable doubt. The jury returned a verdict of guilty as to all appellants on all counts wherein they were charged.

Subsequently, on September 6, 1974, an evidentiary hearing was held in defendants' motion for a new trial. Nevada Jean Armbeck, who had testified at trial as Nevada Robertson, stated that she had been pressured into testifying at trial by F.B.I.

Agents Brunner and Stevens, who threatened her with physical harm, as well as prosecution. (A. 370, 374, 397). The witness then recanted her trial testimony and stated that she had not traveled to Miami at appellant Reed's urging, but had, in fact, requested of him that she go to Miami to work as his housekeeper and governess for his children. (A. 371). Mrs. Armbeck testified that after her arrival in Miami, she was contacted by Melanie Gordon, who gave her the phone number of Jean Hertzka in South Carolina, and told her that "she could earn real good money for a week." (A. 372). She further testified that Reed had not given her any money for air fare to South Carolina, and was, in fact, unaware that she was in South Carolina until after he arrived (A. 373) and that Reed had received none of the money earned by her while she was working in South Carolina.

Nevada Jean Armbeck went on to testify that just prior to her testimony at trial she had stayed with one, Penny Griggs in Chicago (A. 375) where she was visited by two U.S. Marshals, who told her that she had to leave the area, purchased a plane ticket for her, gave her about $112.00, and sent her to Denver. (A. 376). In Denver, she was met by another Marshal, who gave her a $300.00 check for living expenses. Subsequently, she received additional money from the government in amounts of $300.00, $268.00, $495.00 and $495.00. (A. 376-377).

After Nevada Armbeck's testimony at the post-trial hearing, the government produced, for the first time, a list of money which indicated that the witness had been paid approximately $1,000.00 prior to her trial testimony and one or two subsequent payments. (A. 413). The trial court, however, denied petitioners' motion for a new trial and the appellate court affirmed citing "overwhelming credible evidence."

REASONS FOR GRANTING THE WRIT

1. **Further Direction Is Needed to Resolve an Apparent Conflict in the Federal Circuits and Determine Under What Circumstances the Holding in Giglio v. United States, 405 U.S. 150, Should Apply to Payments of Money by the Government to Its Witnesses.**

It was well-established in *Brady v. Maryland*, 373 U.S. 83 (1963), that suppression by the prosecution of evidence favorable to an accused upon request of the defendant violates due process, irrespective of the good or bad faith of the prosecution.

It is equally well-established that "favorable evidence" may be either direct evidence or evidence tending to impeach the credibility of a Government witness.

As this Court stated even prior to *Brady*, *Napue v. Illinois*, 360 U.S. 264, 269 (1959):

> The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest in testifying falsely that a defendant's life or liberty may depend.

More recently, in the leading case of *Giglio v. United States*, 405 U.S. 150 (1972), this Court held that the defendant had been denied due process where the evidence showed that the Government failed to disclose an alleged promise of leniency made to its key witness in return for his testimony. In so holding, the Court stated:

> "Taliento's credibility as a witness was therefore an important issue in the case, and evidence of *any understanding or agreement* as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it." *Giglio*, supra, at 155 (emphasis supplied).

The Court of Appeals for the Fifth Circuit in the recent case of *United States v. Johnson*, 487 F.2d 1318, 1325 (5 Cir. 1974), was faced with a similar problem concerning the prosecution's failure to disclose a promise of leniency made to one of its witnesses. The Court stated:

> "Our guide in this matter is *Giglio v. United States*, supra, and the series of Supreme Court cases discussed therein. The rule is that presentation of known false evidence, and *non-disclosure of evidence affecting credibility*, are grounds for a re-trial if the deception was material, that is if it might 'in *any* reasonable likelihood have affected the judgment of the jury.' *Giglio*, supra, 405 U.S. at 154 . . ." (emphasis supplied).

See also Judge Webster's very comprehensive treatment of the *Brady* rule in *Evans v. Janning*, 489 F.2d 470 (8th Cir. 1973).

Although the information withheld by the Government in the instant case concerns matters other than a promise of leniency, such matters nevertheless may have materially affected the jury's assessment of the witness's credibility and the ability of the defense to adequately prepare for trial.

In fact a similar situation was found to require reversal in the very recent case of *United States v. Librach*, No. 75-1153 (8th Cir. July 30, 1975). Reviewing the non-disclosure of Protective Custody and Government subsidies, the Court of Appeals for the Eighth Circuit reasoned as follows:

> Defendant relies on the familiar rule that Government suppression of favorable evidence material to the defense justifies a new trial irrespective of the good or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83 (1963). In *Giglio v. United States*, 405 U.S. 150 (1972), the Supreme Court reversed a conviction secured on a witness's

false denial that the Government promised him leniency for his testimony. Therein it noted that the particular witness's reliability may have been determinative of guilt or innocence. The Court held that nondisclosure of evidence affecting the witness's credibility falls within the *Brady* rule, provided "the false (or suppressed) testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . ." *Giglio v. United States, supra,* at 154, quoting *Napue v. Illinois,* 360 U.S. 264, 271 (1959).

Application of these principles to the instant case calls for a new trial. This is an egregious case of prosecutorial suppression of evidence that was both favorable and material to the defense. *Evans v. Jannings,* 489 F.2d 470, 475 (8th Cir. 1973). The Government's failure to disclose protective custody and its substantial payment of almost $10,000 to Robert Fowler obviously could have affected the jury's judgment of the witness's credibility. The circumstances were such that Fowler's testimony was the primary basis for determining Librach's guilt. The Government's paying a monthly subsidy to a witness is certainly a fact that should be disclosed to the trier of the facts since it is relevant to the witness's interest in testifying.

Similar situations will undoubtedly arise as the Government seeks to utilize the subsistence payments provisions of Pub. L. 910452. Consequently, it is important that both prosecution and defense be provided with guidelines regarding the extent of disclosure which will be required.

2. **Guidance Is Needed From This Court in Fashioning an Appropriate Burden of Proof Reasonable Doubt Instruction.**

Both trial and appellate courts have been floundering in their attempts to adequately define and instruct on the burden of proof and the meaning of reasonable doubt. See e.g.: *Miles v. United States,* 103 U.S. 304 (1880); *Dunbar v. United States,* 156 U.S. 185, 199 (1895); *Speiser v. Rondall,* 356 U.S. 513, 523, 534 (1958); *Compton v. United States,* 305 F.2d 119 (9th Cir. 1962); *United States v. Barrbera,* 386 F.2d 333 (2d Cir. 1973); *United States v. Crisco,* 493 F.2d 232 (8th Cir. 1973).

In the instant case, the trial court gave the following explanation of reasonable doubt:

> "The burden of proving a defendant guilty beyond a reasonable doubt rests upon the government. This burden never shifts throughout the trial. *The law does not require a defendant to prove his innocence or to produce any evidence. He may rely upon evidence brought out on examination of witnesses for the government.* If the government fails to prove a defendant guilty beyond a reasonable doubt, the jury must acquit him or her. Now, a reasonable doubt, as is used in these instructions, means a doubt that is based on reason and common sense. *Such doubt must be substantial rather than speculative,* that is a defendant is never to be convicted on mere suspicion or conjecture. *Such doubt, however, must be a doubt that is reasonable and one which arises from the evidence or lack of it.* It does not mean a mere possible doubt or a speculative, imaginary, or forced doubt, because anything relating to human affairs is open to some possible or imaginary doubt." (A. 308-309) (Emphasis supplied).

Of course, it is well established that the defendant need not "rely" on any evidence and to say that he may rely on evidence brought out on cross-examination implies that there must be some evidence (whether "produced" by the Government or defendant) upon which defendant bases his case.

The misleading and prejudicial effect of these phrases is compounded by the next paragraph of the instruction wherein the Trial Court states that a reasonable doubt *"must be substantial* rather than speculative." (Emphasis supplied).

In *United States v. Atkins*, 487 F.2d 257 (8 Cir. 1973), the Court rejected the equating of reasonable doubt with substantial doubt stating:

> "The objection made on this appeal is that substantial doubt is not the equivalent of reasonable doubt. We agree. Proof of guilt beyond a reasonable doubt would seem to require a greater evidentiary showing by the government than proof of guilt beyond a substantial doubt. For this reason, we do not approve of the alternative statement that reasonable doubt means a substantial doubt."

The Court of Appeals in *Atkins* found particularly persuasive the reasoning of Judge Seiler of the Missouri Supreme Court when he observed in *State v. Davis*, 482 S.W. 2d 486 (Mo. 1972) at p. 490:

> "Reasonable and substantial are not synonymous, as can be seen by referring to any of the Standard dictionaries. The point was well put by counsel in argument recently where he pointed out that if one had to undergo a serious operation and were querying the doctor as to the prospects for a successful outcome, how differently the person would feel if the doctor told him there was only a reasonable chance of success as opposed to being there was a substantial chance of success."

Similar reasoning is found in *United States v. Alvero*, 470 F. 2d 981 (5 Cir. 1972) where the appellate Court held that the phrase "very substantial doubt" overstated the degree of uncertainty required for reasonable doubt and constituted reversible error.

In the instant case the Court of Appeals expressed dissatisfaction with the trial court's instruction noting that it "is confusing in that arguably it raises the burden from 'reasonable doubt' to 'substantial doubt' and would better be left unsaid." However, the Court declined to reverse on this point.

In view of the apparent confusion and conflict of decisions on this issue it is submitted that standards for an instruction on reasonable doubt should be set by this Court.

CONCLUSION

For the foregoing reasons a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals.

Respectfully submitted

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APPENDIX

UNITED STATES of America, Plaintiff-Appellee,

v.

Kathleen Maude MUCKENSTRUM, a/k/a Kim Baker, Glenda Dale Hodges a/k/a Cindy Baker, James Marshall Reed and Jean Hertzka, a/k/a Pat Walker, Defendants-Appellants.

No. 74-3550.

United States Court of Appeals, Fifth Circuit.

July 3, 1975.

Defendants were convicted in the United States District Court for the Southern District of Florida at Miami, Peter T. Fay, J., for conspiracy to engage in interstate prostitution activities, and certain defendants were convicted of substantive offenses, and they appealed. The Court of Appeals, Bell, Circuit Judge, held that Government's failure to disclose that government witness received subsistence payments prior to testifying, if error, was harmless in light of the overwhelming evidence adduced at trial against defendants; that trial judge did not err in denying motion for new trial based on government witness' recantation of her trial testimony; that FBI report of interview with government witness who was not quoted directly and who had not seen the report prior to posttrial hearing was not Jencks Act material; and that instruction concerning reasonable doubt did not equate reasonable doubt with substantial doubt, although sentence in instruction that doubt must be substantial rather than speculative would better be left unsaid.

Affirmed.

1. Criminal Law ⇐1171.1(1)

Government's failure to disclose that government witness had received approximately $1,000 in subsistence payments prior to trial, if error, was harmless in view of overwhelming evidence against defendants. Organized Crime Control Act of 1970, §§ 501–504, 84 Stat. 933.

2. Criminal Law ⇐942(2)

Denial of motion for new trial based on government witness' repudiation of her grand jury and trial testimony was not error in view of overwhelming credible evidence against defendants and the suspect nature of the witness' recantation.

3. Criminal Law ⇐938(4)

Testimony of Government's witness at posttrial hearing on motion for new trial as to threats and promises of leniency did not require new trial in view of testimony of federal agents that no threats or promises had been made to the witness.

4. Criminal Law ⇐627.8(5)

FBI report of interview with government witness who was not quoted directly in the report and who had not seen the report prior to posttrial motion was not Jencks Act material. 18 U.S.C.A. § 3500.

5. Criminal Law ⇐822(1)

Instruction claimed to be erroneous would be viewed in context of the whole charge.

6. Criminal Law ⇐789(7)

Instruction concerning reasonable doubt was not erroneous on theory that it equated reasonable doubt with substantial doubt, although sentence instructing that doubt must be substantial rather than speculative would better be left unsaid.

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7. Criminal Law ⇐778(5)

Instruction that defendant is not required to produce any evidence and may rely upon evidence brought out on examination of witnesses for the Government did not shift burden of proof to defendants.

8. Criminal Law ⇐393(1)

Notebook discovered incident to defendant's lawful arrest and containing the hand-entered telephone number of codefendant was an instrumentality of crime of conspiracy to engage in interstate prostitution activities and admission of the notebook into evidence did not violate defendant's right against self-incrimination. 18 U.S.C.A. §§ 1952, 2422, 3500.

Appeals from the United States District Court, Southern District of Florida.

Before BELL, DYER and SIMPSON, Circuit Judges.

BELL, Circuit Judge:

This appeal involves an interstate prostitution operation between Florida and South Carolina. Defendants Muckenstrum, Hodges, Reed, and Hertzka were convicted on one count of conspiracy to engage in interstate prostitution activities in violation of 18 U.S.C.A. § 1952, and on one count charging substantive violations of Section 1952 by using interstate facilities or traveling in interstate commerce to carry on prostitution. Additionally, procurer Reed was convicted on one count of inducing a woman to engage in interstate prostitution activities in violation of 18 U.S.C.A. § 2422. We affirm.

[1] Appellants' first contention is that a new trial is necessitated by the failure of the government to disclose that government witness Nevada Jean Robertson a/k/a Nevada Smith received subsistence payments prior to testifying. At trial, defense counsel learned for the first time that Robertson was and had been under the protection of U.S. marshalls, but no information was volunteered by the government or solicited by the defense concerning subsistence payments to Robertson.[1] Subsequent to trial, defense counsel discovered that Robertson had received approximately one thousand dollars in subsistence payments prior to trial.

No attack on the payments per se is sustainable since subsistence payments to government witnesses are authorized by Pub.L. 91-452, Title V, §§ 501-504, Oct. 15, 1970, 84 Stat. 933. *See* United States v. Howell, 5 Cir., 1975, 514 F.2d 710 (No. 74-2427, June 11, 1975). The gravamen of appellants' complaint is that defense impeachment of witness Robertson was severely hampered by the lack of knowledge concerning the payments. According to appellants, Robertson's testimony formed a substantial portion of the case against them, and the subsistence payments issue could have been used to discredit that testimony.

Assuming arguendo that it was error for the government to fail to disclose the subsistence payments despite the information not having been sought, we hold that the failure of the government to do so was harmless error in light of the overwhelming evidence adduced at trial

1. At oral argument, government counsel (an assistant U.S. attorney), who also had handled the case at trial, stated that the existence of the payments was not consciously withheld from the defense as government counsel himself did not know of such payments. However, counsel conceded that the subsistence payments were within the ambit of his constructive knowledge as assistant U.S. attorney.

against appellants. *See* Harrington v. California, 1969, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284. Besides Nevada Jean Robertson, the government produced Erlene Edwards, who testified that she was employed by Hertzka in operating a house of prostitution in Florence, South Carolina. Her duties included answering the door, getting the girls up in the morning and the taking of their receipts during the day for them. She identified defendants Hodges and Muckenstrum as being prostitutes at the house.

Melanie Ann Gordon testified that she travelled from Miami to Florence, South Carolina along with defendants Muckenstrum and Hodges, while in the employ of and at the instance of defendant Reed, to work as a prostitute at the Hertzka house. She testified that Muckenstrum and Hodges were also employed by Reed.

This direct testimony of witnesses was buttressed by documentary evidence. An FBI agent testified that a notebook had been found in Hertzka's possession at the time of her arrest and that the name "Jim" appeared in the book next to a telephone number later shown to be James Reed's Miami telephone number. Telephone records were introduced indicating numerous calls between James Reed's number in Miami and Hertzka's in South Carolina (listed under the alias Pat Walker).

Nevada Robertson testified that she was employed by Reed, that he sent her from Miami to the Hertzka house in Florence, and that she worked in the house as a prostitute. Thus her testimony was largely the same as that of witnesses Edwards and Gordon.

[2] Appellants next urge reversal and a new trial based on Nevada Jean Robertson's recantation of her trial testimony at a post-trial hearing based upon a motion for new trial. Robertson did repudiate her grand jury and trial testimony. The government countered by producing witnesses impeaching Robertson's recantation. We have closely examined Robertson's post-trial testimony and find it untenable at best. Coupled with the overwhelming credible evidence against appellants and the extremely suspect nature of Robertson's recantation, the trial judge did not err in denying the motion for a new trial. *See* United States v. Johnson, 5 Cir., 1974, 487 F.2d 1318, 1325.

[3] Appellants also urge that a new trial should have resulted from the failure of the government to inform defense counsel of alleged threats and promises of leniency described by Robertson during the post-trial hearing. Federal agents testified at the hearing that no threats or promises had been made to Robertson. There is no merit whatever in this contention.

[4] Appellants next contend that the government withheld statements of government witness Melanie Ann Gordon in violation of the Jencks Act (18 U.S.C.A. § 3500). Melanie Ann Gordon testified for the government at this trial and also in a subsequent trial giving rise to the appeal in United States v. Prince, 5 Cir., 1975, — F.2d —, this day decided. The government produced an FBI report in the Prince trial of an interview with Gordon. It was not produced in this trial and thus the claim of a Jencks Act violation.

We have examined the FBI report in issue and find it is not Jencks Act material. As brought out at the post-trial evidentiary hearing, the FBI report did not quote Gordon directly, was not signed by her, and had not been seen by

her prior to the post-trial hearing. *See* United States v. Blackburn, 5 Cir., 1971, 446 F.2d 1089; United States v. Roberts, 5 Cir., 1972, 455 F.2d 930. The trial judge did not err in refusing to grant the motion for new trial based upon this contention of appellants.

[5, 6] Appellants attack the jury instructions concerning reasonable doubt and the burden of proof. The alleged erroneous portion of the reasonable doubt charge is as follows:

> Now, a reasonable doubt, as used in these instructions, means a doubt that is based on reason and common sense. Such doubt must be substantial rather than speculative, that is, a defendant is never to be convicted on mere suspicion or conjecture. Such doubt, however, must be a doubt that is reasonable and one which arises from the evidence or lack of it.
>
> It does not mean a mere possible doubt or a speculative, imaginary or forced doubt, because everything relating to human affairs is open to some possible or imaginary doubt.

Appellants argue that this portion of the charge equates reasonable doubt with substantial doubt. We must view this instruction in the context of the whole charge. *See* Baker v. United States, 5 Cir., 1969, 412 F.2d 1069. Having done so, we disagree with appellants. We hasten to add, however, that the sentence instructing that a doubt must be substantial rather than speculative is confusing in that arguably it raises the burden from "reasonable doubt" to "substantial doubt" and would better be left unsaid.

[7] Appellants next contend that the burden of proof instruction used by the trial court impermissibly shifted the burden of proof to them. The portion of the charge highlighted by appellant is as follows:

> The law does not require a defendant to prove his innocence or to produce any evidence. He may rely upon evidence brought out on examination of witnesses for the Government.

The court instructed the jury that the defendant is presumed innocent until proven guilty and on more than one occasion instructed that the burden of proving a defendant guilty beyond a reasonable doubt rests on the government. We find no error.[2]

[8] Appellant Hertzka contends that the admission into evidence of the notebook containing the hand-entered telephone number of defendant Reed, discovered incident to her lawful arrest, violated her Fifth Amendment right against self-incrimination. There was no error in admitting this instrumentality of the crime. *See* United States v. Bennett, 2 Cir., 1969, 409 F.2d 888, 895–96; United States v. Hanon, 8 Cir., (en banc), 1970, 428 F.2d 101, 106–107. In Romanelli v. C. I. R., 7 Cir., 1972, 466 F.2d 872, 877 n.9, the Seventh Circuit pointed out the inapplicability of Hill v. Philpott, 7 Cir., 1971, 445 F.2d 144, relied on by appellants, where instrumentalities of the crime are involved (gambling paraphernalia).

We have examined the remaining arguments of appellants and find them to be without merit.

Affirmed.

2. This same argument was made in connection with a similar charge in Prince v. United States, *supra*, this day decided. The sentence that "He may rely upon evidence brought out on examination of witnesses for the government." adds little to the charge and serves no purpose unless a defendant seeks such an instruction. It may, after all, be in the interest of the defendant rather than the contrary as is argued here.